IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CURTIS BOYER, DAVID J. JARAMILLO, DARIEN WASHINGTON, SAMUEL LEE WELLS, and CITIRAH WHARTON	:	CIVIL ACTION
	:	NO. 02-CV-8382
v.	:	
JOHNSON MATTHEY, INC. and UNITED STEELWORKERS OF AMERICA, LOCAL 1165-02	:	

SURRICK, J. **JANUARY 6, 2005**

MEMORANDUM & ORDER

Presently before this Court are the following Motions: Defendant Johnson Matthey, Inc.'s ("JMI") Motions for Summary Judgment as to the claims of Citirah Wharton (Doc. No. 29), Curtis Boyer (Doc. No. 35), Samuel Lee Wells (Doc. No. 42), and Darien Washington (Doc. No. 45); Defendant United Steelworkers of America, Local 1165-02's ("Local 1165-02" or "Union") Motions for Summary Judgment as to the claims of Curtis Boyer (Doc. No. 46), David J. Jaramillo (Doc. No. 47), Darien Washington (Doc. No. 48), Samuel Lee Wells (Doc. No. 49), and Citirah Wharton (Doc. No. 50); and JMI's Motion In Limine To Exclude Certain Evidence of Alleged Harassment (Doc. No. 69). For the following reasons, Defendant JMI's Motions as to Boyer, Wells, and Wharton will be granted and its Motion as to Washington will be denied. Defendant Union's Motions as to the disparate treatment claims of each Plaintiff will be granted. JMI's Motion in limine will be granted in part and denied in part.

I. BACKGROUND

Plaintiffs are current or former employees of JMI and members of Local 1165-02, which

is a labor organization. (Compl. ¶ 13.) Plaintiffs Boyer and Wharton allege that they suffered adverse employment actions because of their race. (*Id.* ¶ 16). All Plaintiffs allege that Defendants subjected them to a racially hostile work environment. (*Id.* ¶ 15). Based on these allegations, each Plaintiff filed an individual charge of discrimination against Defendants with the Pennsylvania Human Relations Commission ("PHRC") and the Equal Employment Opportunity Commission ("EEOC"). (*Id.* ¶¶ 29, 30, 33.) Both Defendants were named as respondents in each of the administrative charges.

Plaintiffs then consolidated their claims in the Complaint filed with this Court on November 8, 2002. The Complaint alleges three causes of action: (1) violation of 42 U.S.C. § 1981, which Plaintiffs argue entitles them to certain equitable relief, as well as compensatory damages, punitive damages, and attorneys' fees; (2) violation of the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons. Stat. § 955; and (3) violation of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. § 2000e. Plaintiffs request back pay and front pay for Jaramillo, since he is the only Plaintiff who no longer works at JMI, compensatory damages, punitive damages, and attorneys' fees for violation of the PHRA and Title VII.

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The party moving for summary judgment bears the initial burden of demonstrating that there are no facts supporting the non-moving party's legal position. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). Once the moving party carries this initial burden, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (explaining that the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts"). "The nonmoving party . . . 'cannot rely merely upon bare assertions, conclusory allegations or suspicions' to support its claim." *Townes v. City of Philadelphia*, Civ. A. No. 00-CV-138, 2001 U.S. Dist. LEXIS 6056, at *4 (E.D. Pa. May 11, 2001) (quoting *Fireman's Ins. Co. v. DeFresne*, 676 F.2d 965, 969 (3d Cir. 1982)). Rather, the party opposing summary judgment must go beyond the pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. When deciding a motion for summary judgment, the court must view facts and inferences in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255; *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1127 (3d Cir. 1995). We will not resolve factual disputes or make credibility determinations. *Siegel Transfer, Inc.*, 54 F.3d at 1127.

III. APPLICABLE STATUTES OF LIMITATIONS

In order to determine which adverse employment actions Plaintiffs may rely on to support their disparate treatment claims against each Defendant, we must review the various statutes of limitations which apply to the claims.

A. Title VII and PHRA

As a prerequisite to filing suit in federal court under Title VII, a plaintiff must file a charge with the EEOC within 180 days after the alleged unlawful employment practice occurred, or, if the claims are filed with a state or local agency with authority to grant or seek relief from such practice, then the claims must be filed with the EEOC within 300 days after the alleged unlawful employment practice occurred. 42 U.S.C. § 2000e-5(e)(1) (2000). Since Pennsylvania is such a deferral state, federal charges must be filed with the EEOC within 300 days of the alleged discrimination. *Gerhart v. Boyertown Area Sch. Dist.*, Civ. A. No. 00-5914, 2002 U.S. Dist. LEXIS 11935, at *10 (E.D. Pa. Mar. 5, 2002). Claims under the PHRA must be filed with the PHRC within 180 days after the alleged act of discrimination. 43 Pa. Cons. Stat. § 959(h) (2004).

B. Section 1981

Plaintiffs allege that JMI and the Union violated 42 U.S.C. § 1981 by engaging in disparate treatment and fostering a hostile work environment. Section 1981 does not specify an applicable statute of limitations. *See generally* 42 U.S.C. § 1981 (2000). In December 1990, Congress passed 28 U.S.C. § 1658, which provided a general statute of limitations for all acts of Congress enacted after that date.[1] In *Jones v. R.R. Donnelley & Sons Co.*, 124 S. Ct. 1836 (2004), the Supreme Court held that § 1658's four-year limitations period applies "if the plaintiff's claim against the defendant was made possible by a post-1990 enactment." *Id.* at 1845. Congress amended 42 U.S.C. § 1981 in 1991. Pub. L. No. 102-166, Title I, § 101, 105

[1]Section 1658 provides in pertinent part: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of enactment of this section may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C. § 1658 (2000).

Stat. 1071 (1991).[2] Because "[a]n amendment to an existing statute is no less an 'Act of Congress' than a new, stand-alone statute," *Jones*, 124 S. Ct. at 1844, the *Jones* Court concluded that the additional language added to § 1981 constituted an enactment, *id.* at 1844, 1846, and that § 1658's four-year limitations period thus applied to plaintiffs' claims. *Id.* at 1846. In explaining its decision, the Court noted, "[i]t spares federal judges and litigants the need to identify the appropriate state statute of limitations to apply to new claims but leaves in place the 'borrowed' limitations periods for preexisting causes of action, with respect to which the difficult work already has been done." *Id.* at 1845.

Given the *Jones* decision, the critical inquiry in this case is when each Plaintiff could have made the following claims: (1) disparate treatment claim against the Union; (2) hostile work environment claim against the Union; (3) disparate treatment claim against the Company; and (4) hostile work environment claim against the Company. If a claim was available under 42 U.S.C. § 1981 before Congress amended it in 1991, then Pennsylvania's two-year statute of limitations for personal injuries applies. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662 (1987).[3] If, however, a claim under 42 U.S.C. § 1981 became available as a result of the congressional amendment, then § 1658's four-year statute of limitations applies.

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[2]Congress added a provision to the statute which defined the term "make and enforce contracts" to include the "termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b) (2000).

[3]In *Goodman*, the Supreme Court reviewed the Third Circuit's determination that Pennsylvania's two-year statute of limitations, which applied to personal injuries, applied to the plaintiff's § 1981 claims against his union. The Court agreed with the appellate court and held that the two-year limitations period applied. *Goodman*, 482 U.S. at 662.

1. Claims Against Union Under 42 U.S.C. § 1981

Prior to Congress's 1991 amendment of 42 U.S.C. § 1981, a plaintiff could assert a claim against a union for racial discrimination. In interpreting § 1981, the *Goodman* Court recognized that the statute prohibited unions from using the grievance process to discriminate against racial minorities. *Id.* at 669.[4] Thus, a union could not engage in any racial discrimination against its members. *Id.* Furthermore, it could not merely ignore member complaints of racial harassment. *Id.* at 664-65; *see also Allensworth v. Gen. Motors Corp.*, 945 F.2d 174, 179 (7th Cir. 1991) (affirming grant of summary judgment to defendant union because the union addressed plaintiff's complaints of racial harassment); *Woods v. Graphic Communications*, 925 F.2d 1195, 1203 (9th Cir. 1991) (affirming judgment against union because it failed properly to address plaintiff's complaints of racial harassment). Because the Plaintiffs in this case could have raised their § 1981 disparate treatment and racial harassment claims against Local 1165-02 prior to the 1991 amendment to the statute, we must apply Pennsylvania's two-year statute of limitations for personal injuries to their claims. Plaintiffs filed the instant action on November 8, 2002. Thus, Plaintiffs may only point to alleged discriminatory acts which occurred on or after November 8, 2000, to support their § 1981 claims against the Union.

[4]Prior to the 1991 amendment, § 1981 provided: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1981 (1982).

2. Claims Against Employer Under 42 U.S.C. § 1981

A plaintiff seeking to pursue certain § 1981 claims against an employer under the statute's framework prior to Congress's 1991 amendment does not fare as well. While § 1981 clearly applied to racial discrimination of a union, its application to other entities was limited. In the case of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Supreme Court stated:

> [W]e have held that certain private entities such as labor unions, which bear explicit responsibilities to process grievances, press claims, and represent member in disputes over the terms of binding obligations that run from the employer to the employee, are subject to liability under § 1981 for racial discrimination in the enforcement of labor contracts. The right to enforce contracts does not, however, extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights.

Patterson, 491 U.S. at 177-78 (citation omitted). Thus, an injury that arose after the formation of a contractual relationship between an employer and employee could not be remedied under § 1981. In the wake of *Patterson*, courts within the Third Circuit would not permit plaintiffs to proceed with 42 U.S.C. § 1981 disparate treatment or racial harassment claims against their employer. *See, e.g., Matthews v. Freedman*, 882 F.2d 83, 84 (3d Cir. 1989) (affirming dismissal of complaint against plaintiff's supervisor because the alleged racial harassment occurred during the course of her employment); *Lewis v. B.P. Oil, Inc.*, Civ. A. No. 88-5561, 1990 U.S. Dist. LEXIS 787, at *3-4 (E.D. Pa. Jan. 29, 1990) (dismissing plaintiff's § 1981 claim against his employer because it was "based solely on alleged racial discrimination and harassment occurring after the formation of plaintiff's employment relationship with defendant").

Here, the Plaintiffs could not have pursued their claims against JMI prior to Congress's amendment of § 1981. As a result, we must apply the four-year statute of limitations contained in § 1658 to the disparate treatment and racial harassment claims against the Company. Since

Plaintiffs filed their Complaint on November 8, 2002, they may point only to alleged discriminatory acts which occurred on or after November 8, 1998, to support their § 1981 claims against JMI.

C. Application of Limitations Periods to Plaintiffs Boyer and Wharton

These different limitations periods prevent Boyer and Wharton from relying on certain evidence to support their disparate treatment claims against Defendants under Title VII, the PHRA, and 42 U.S.C. § 1981.

1. Boyer

Boyer filed his charge of discrimination with the PHRC on January 17, 2002. (Compl. Ex. A-1.) To prevail on his Title VII disparate treatment claim against Defendants, Boyer may only point to alleged discriminatory acts which occurred on or after March 23, 2001, 300 days before he filed his charge of discrimination. Under the PHRA, he may only rely on discrete acts which occurred on or after July 21, 2001, 180 days before his administrative filing.

To support his disparate treatment theory against JMI and the Union, Boyer points to three specific instances of alleged discrimination: (1) he was denied a maintenance job in December 1994 (Boyer Dep. at Ex. 9), which the Union did not grieve; (2) he did not receive a precious metal craftsman-specialist position in April 1999 (Doc. No. 36 Ex. F), which the Union also did not grieve; and (3) he was rejected for a precious metal craftsman-specialist position, which was posted in December 2000 (Doc. No. 36 Ex. G), which the Union did not grieve. Boyer points to no discriminatory acts which occurred on or after March 23, 2001. Thus, his disparate treatment claims against JMI and Local 1165-02 under Title VII and the PHRA are barred. In addition, based upon the above discussion of the applicable statutes of limitations

under § 1981, Boyer may not rely on his rejection for the December 1994 job posting to support his § 1981 disparate treatment claim against either Defendant. He may also not rely on the April 1999 job bid to support his § 1981 disparate treatment claim against the Union.

2. Wharton

Wharton filed her charge of discrimination with the PHRC on December 13, 2001. (Compl. Ex. A-5.) To prevail on her Title VII disparate treatment claim against Defendants, she may only point to alleged discriminatory acts which occurred on or after February 16, 2001, to support her claim. Under the PHRA, she may only rely on discrete acts which occurred on or after June 16, 2001. As discussed above, the longest statute of limitations period available to Wharton under § 1981 is four years. She was disciplined for various infractions of Company policy in 1996 and 1997. (Wharton Dep. at 107-11.) Because she pursued her Title VII, PHRA, and § 1981 claims well after the expiration of the statute of limitations with respect to the 1996 and 1997 discipline, she may not rely on that discipline to support her disparate treatment claims against either Defendant.

IV. DISPARATE TREATMENT

A. Disparate Treatment Analysis Regarding Alleged Employer Conduct

Boyer and Wharton each assert disparate treatment claims against JMI under Title VII, the PHRA, and 42 U.S.C. § 1981. (Compl. ¶ 16(a), (e).)[5] The Company has moved to dismiss these claims. In reviewing the validity of Plaintiff's employment discrimination claims, we must

[5]Washington alleges that JMI threatened to discipline him. (Compl. ¶ 16(c)). However, the threat of discipline does not constitute an adverse employment action because it does not constitute a real change in the employee's terms and conditions of employment. *Koschoff v. Henderson*, Civ. A. No. 98-2736, 1999 U.S. Dist. LEXIS 16184, at *37 (E.D. Pa. Oct. 7, 1999).

apply the burden-shifting framework outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[6] *Sarullo v. United States Postal Serv.*, 352 F.3d 789, 797 (3d Cir. 2003). Under this analytical framework, Plaintiff carries the initial burden of proving a prima facie case of discrimination. *McDonnell Douglas*, 411 U.S. at 802. To establish a prima facie case, a plaintiff must demonstrate that: (1) he belongs to a protected class; (2) he was qualified for the position; (3) he was subject to an adverse employment action despite being qualified; and (4) the circumstances of the adverse employment action create an inference of discrimination. *Sarullo*, 352 F.3d at 797 (citing *McDonnell Douglas*, 411 U.S. at 802; *Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344, 348 n.1, 352, 356 (3d Cir. 1999)). This prima facie test "must be tailored to fit the specific context in which it is applied." *Sarullo*, 352 F.3d at 797-98.

If Plaintiff is able to establish a prima facie case, the burden of production shifts to Defendant to "articulate some legitimate, nondiscriminatory reason" for the adverse employment decision. *McDonnell Douglas*, 411 U.S. at 802. The employer need not show that it was actually motivated by its proffered reasons, *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993), since "'throughout this burden-shifting paradigm the ultimate burden of proving intentional discrimination always rests with the plaintiff.'" *Simpson v. Kay Jewelers*, 142 F.3d 639, 644 n.6 (3d Cir. 1998) (quoting *Fuentes v. Perskie*, 32 F.3d 759, 763 (3d Cir. 1994)). Once the employer meets its "relatively light burden," "the burden of production rebounds to the plaintiff, who must now show by a preponderance of the evidence that the employer's

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[6]The *McDonnell Douglas* framework applies equally to Title VII, PHRA, and § 1981 claims. *Younge v. St. Paul Fire & Marine Ins. Co.*, Civ. A. No. 01-4218, 2002 U.S. Dist. LEXIS 12293, at *13-14 (E.D. Pa. June 20, 2002) (citing *Pamintuan v. Nanticoke Mem'l Hosp.*, 192 F.3d 378, 385 (3d Cir. 1999); *Gomez v. Allegheny Health Servs., Inc.*, 71 F.3d 1079, 1083-84 (3d Cir. 1995)).

explanation is pretextual (thus meeting the plaintiff's burden of persuasion)." *Fuentes*, 32 F.3d at 763. Plaintiff "must meet his burden of persuasion by proving that the defendant's proffered reason is not the true reason for its decision, but instead is merely a pretext for racial discrimination." *Velez v. QVC, Inc.*, 227 F. Supp. 2d 384, 408 (E.D. Pa. 2002) (citing *Fuentes*, 32 F.3d at 764); *see also Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 136 (3d Cir. 1997).[7] "[I]t is not enough to show that an employer's decision was wrong; the issue is 'whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent or competent.'" *Younge v. St. Paul Fire & Marine Ins. Co.*, Civ. A. No. 01-4218, 2002 U.S. Dist. LEXIS 12293, at *16-17 (E.D. Pa. June 20, 2002) (quoting *Jones v. Sch. Dist. of Phila.*, 198 F.3d 403, 413 (1999)); *see also Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1108-09 (3d Cir. 1997). To survive summary judgment, a plaintiff must "point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." *Fuentes*, 32 F.3d at 764 (citing *Hicks*, 509 U.S. at 511; *Ezold v. Wolf, Block, Schorr, & Solis-*

[7]In interpreting Title VII, the courts "have recognized two types of disparate treatment employment discrimination actions - 'pretext' and 'mixed motive' - and have applied different standards of causation depending on the type of case the plaintiff has presented." *Watson v. Southeastern Pa. Transp. Auth.*, 207 F.3d 207, 214-15 (3d Cir. 2000) (citing *Griffiths v. CIGNA Corp.*, 988 F.2d 457, 472 (3d Cir. 1993)). In contrast to the "pretext" theory brought by Plaintiffs, in a "mixed motive" case, the "plaintiff need only show that the unlawful motive was a 'substantial motivating factor' in the adverse employment action." *Id.* (citing *Miller v. CIGNA Corp.*, 47 F.3d 586, 595 (3d Cir. 1995)). Plaintiffs have not pursued a mixed motive theory. The fact that Plaintiffs have not labeled the instant suit a "mixed motive" action does not mean the Court is precluded from considering it as such. However, the fact that Plaintiffs have not contended that Defendant's conduct was motivated in part by legitimate reasons suggests that this case only involves the existence of "pretext."

Cohen, 983 F.2d 509, 523 (3d Cir. 1992)). In attacking the employer's proffered reasons, a plaintiff "'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could rationally find them unworthy of credence.'" *Keller*, 130 F.3d at 1108-09 (quoting *Fuentes*, 32 F.3d at 765). If Plaintiff seeks to demonstrate pretext by showing that the employer took the adverse employment action for an invidious discriminatory reason, he "must point to evidence that proves . . . discrimination in the same way that critical facts are generally proved - based solely on the natural probative force of the evidence." *Id.* at 1111.

With these standards in mind, we will now assess whether the parties have met their respective evidentiary burdens.

1. Boyer

To prevail on his disparate treatment theory against JMI under 42 U.S.C. § 1981, Boyer points to two specific instances of alleged discrimination: (1) he did not receive a precious metal craftsman-specialist position in April 1999 (Doc. No. 36 Ex. F); and (2) he was rejected for a precious metals craftsman-specialist position which was posted in December 2000 (*id.* at Ex. G).

a. The April 1999 Precious Metal Craftsman-Specialist Position

In April 1999, a precious metal craftsman-specialist position became available. Thirteen employees, including Boyer, expressed interest in the position. (*Id.* at Ex. F.) Seven of the employees who bid for the position were more senior than Boyer. (Brady Aff. ¶ 7.) Under the terms of the governing collective bargaining agreement ("CBA") between JMI and the Union, Boyer could not receive the job because he already had a position with the Company and he was not the most senior applicant. (*Id.*) Bert Greeby, who was the most senior bidder, received the

position. (*Id.*) The Company told Boyer that Greeby received the position because of his seniority. (Boyer Dep. at 161.) Boyer did not grieve this award through the Union. (*Id.*)

Plaintiff cannot establish a prima facie case of race discrimination because he was not qualified for the precious metal position. When he bid for the position, he was not qualified under the bidding procedures of the CBA because he did not have sufficient seniority. *See Walker v. Pepsi-Cola Bottling Co.*, Civ. A. Nos. 98-225-SLR, 99-748-JJF, 2000 U.S. Dist. LEXIS 12635, at *40-41 (D. Del. Aug. 10, 2000) (plaintiff could not establish that he was qualified because he was not the most senior applicant under the terms of the CBA). Moreover, Plaintiff points to no evidence that would permit an inference of discrimination.

Assuming *arguendo* that Boyer could satisfy his prima facie burden, the Company has offered a legitimate, non-discriminatory reason for declining to award the position to Boyer. The Company and the Union entered into a specific agreement regarding the precious metal position. (Boyer Dep. at 152-53.) When JMI reclassified the precious metal craftsman job from an unskilled position to a skilled one, it agreed that the next opening for that specific position would be an unskilled worker. (*Id.* at 160.) In addition, JMI applied the seniority provisions of the CBA when it selected Greeby for the position. Under Section 7.2.3 of the CBA:

> An employee on layoff will have a bid on all jobs that are posted. The bids of laid-off employees and the bids of the employees working will be put together, and the employee having the most seniority will be awarded the job provided he has the necessary abilities and qualifications for the open job or jobs.

(CBA § 7.2.3.) Greeby had fourteen years of seniority over Boyer and was the most senior applicant for the job. (Brady Aff. ¶ 7.) Therefore, in accordance with the Company's agreement with the Union, it awarded the precious metal position to Greeby.

Since the Company proffers a legitimate, non-discriminatory reason for not awarding the position to Boyer, Plaintiff must offer some evidence of pretext. However, Boyer does not allege that Greeby was selected for the position because of his race. While it may not have been a good business decision for JMI to agree to hire an unskilled worker for a job position that is classified as skilled, Plaintiff fails to point to any evidence that the Company entered into its arrangement with the Union for an invidious discriminatory purpose. *See Fuentes*, 32 F.3d at 765 ("To discredit the employer's proffered reason, . . . the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.").[8] In fact, Boyer's administrative charge actually concedes that race had nothing to do with the decision to hire Greeby because he "got the job based purely on seniority . . . ." (Doc. No. 36 Ex. D.) Boyer is unable to establish pretext.

b. The December 2000 Precious Metal Craftsman-Specialist Position

On December 14, 2000, JMI posted another precious metal craftsman-specialist position. Five employees, including Boyer, expressed interest in the position. (*Id.* at Ex. G.) The job posting stated that a successful applicant "[m]ust be fully qualified" (*id.*), which required that an applicant possess over four years of experience. (Brady Aff. ¶ 8.) No JMI applicant was fully qualified. Boyer had only approximately twenty-six months of experience as a precious metal craftsman. (Boyer Dep. at 162.) Because no bidder was qualified for the position, JMI hired Steve Morris from outside the Company. (Brady Aff. ¶ 8.) The Union chose not to grieve the

[8]Boyer also failed to lodge a grievance with the Union, which suggests that he did not believe at the time that he did not receive the position as a result of race discrimination.

placement. Boyer is unable to satisfy his prima facie burden because he was not qualified for the precious metal craftsman position. Boyer admits that he was not qualified for the position. (Boyer Dep. at 163.) Boyer also fails to offer evidence to support an inference of discrimination.

Even if Plaintiff could establish a prima facie case, the Company has offered a legitimate, non-discriminatory reason for choosing not to award the position to Boyer. The precious metal craftsman-specialist position required that a successful applicant have four years of experience as a precious metal craftsman. (Brady Aff. ¶ 8.) When nobody within JMI is qualified for a certain job, the Company has the right to hire a person from outside. (Boyer Dep. at 167.) Because nobody who applied for the position was fully qualified (*id.*; Brady Aff. ¶ 8; Doc. No. 36 Ex. D), the Company hired Morris. Since the Company proffers a legitimate, non-discriminatory reason for not selecting Plaintiff for the position, Plaintiff must offer evidence of pretext.

Boyer has failed to demonstrate that the decision not to hire him was pretextual. He never avers that Morris was selected for other than the reasons provided by the Company. Further, he offers no evidence to show that there was an invidious discriminatory motive behind the decision not to award the specialist position to Plaintiff. Thus, Plaintiff's § 1981 claim as to this adverse employment action fails as well.

2. Wharton

JMI moves for summary judgment on Wharton's claim that the Company engaged in disparate treatment. Specifically, the Company focuses on two separate incidents: (1) Wharton was disciplined for excessive absenteeism on July 16, 2001 (Wharton Dep. at 112); and (2) Wharton alleges that she did not receive premium compensation for a shift transfer in October 2001. (Compl. ¶ 16(e)).

In Wharton's response to the Company's Motion, however, she does not address the Company's argument regarding her disparate treatment claim against JMI. In opposing a motion for summary judgment, a party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Plaintiff offers no specific facts to show that there is a genuine issue for trial and completely fails to address Defendant JMI's disparate treatment argument. Plaintiff offers no evidence to support a prima facie disparate treatment claim, nor does she offer evidence of pretext to counter JMI's legitimate, non-discriminatory reasons for its actions.[9] *See Lawton v. Sunoco, Inc.*, Civ. A. No. 01-2784, 2002 U.S. Dist. LEXIS 13039, at *19 (E.D. Pa. July 17, 2002) (granting summary judgment because plaintiff failed to address defendant employer's legitimate, non-discriminatory reasons for hiring others); *see also Litzenberger v. Vanim*, Civ. A. No. 01-5454, 2002 U.S. Dist. LEXIS 13843, at *16-17 (E.D. Pa. July 31, 2002) (granting summary judgment on an issue that was briefed by moving party but not addressed by non-moving party). Finally, it appears that Wharton's response does not even assert that she will pursue a theory of disparate treatment against JMI. *See Coxfam v. AAMCO Transmissions*, Civ. A. No. 88-6105, 1990 U.S. Dist. LEXIS 11838, at *9 n.6 (E.D. Pa. Sept. 7, 1990). Under the circumstances, summary judgment is appropriate.

[9]The Company disciplined Wharton as a result of a review of the absenteeism record for all employees. (Wharton Dep. at 112-13.) Further, JMI applied Section 7.2.16 of the CBA in declining to accede to Wharton's request for premium compensation. (*Id.* at 99, 101.) Each of these justifications satisfies the Company's burden of offering a legitimate, non-discriminatory reason for its conduct because it is evidence "which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision." *Fuentes*, 32 F.3d at 763 (citing *St. Mary's*, 509 U.S. at 509).

B. Disparate Treatment Analysis Regarding Alleged Union Conduct

Plaintiffs claim that Local 1165-02 engaged in disparate treatment when it used race as a basis for refusing to pursue specific grievances and for withdrawing otherwise valid grievances. (Compl. ¶ 18.) In responding to the Union's Motion for Summary Judgment regarding the disparate treatment claims of each Plaintiff, however, Plaintiffs Washingon[10] and Wells fail to point to any instance where the Union refused to pursue a specific grievance or withdrew an otherwise valid grievance. Therefore, they cannot prevail on their individual disparate treatment claims against the Union under Title VII, the PHRA, or 42 U.S.C. § 1981.

Since Plaintiffs Boyer, Jaramillo, and Wharton each point to evidence to support their disparate treatment theory against Local 1165-02, we will review the merits of these claims. A union may not discriminate on the basis of race and may not cause or attempt to cause an employer to discriminate against an individual on the basis of race. 42 U.S.C. § 2000e-2(c) (2000); 43 Pa. Cons. Stat. § 955 (2004). A union's deliberate failure to process a grievance can constitute a violation of Title VII, the PHRA, and § 1981. *See Goodman v. Lukens,* 482 U.S. 656, 669 (1987); *Copes v. Children's Hosp. of Phila.*, Civ. A. No. 99-1331, 1999 U.S. Dist. LEXIS 9242, at *8-9 (E.D. Pa. June 11, 1999). The *Goodman* court explained that these statutory provisions

> do not permit a union to refuse to file any and all grievances presented by a black person on the ground that the employer looks with disfavor on and resents such grievances. It is no less violative of these laws for a union to pursue a policy of

[10]Washington asserts that he was prevented from participating in a grievance meeting regarding Jaramillo in August 2001. (Compl. ¶ 16(c); Doc. No. 51 Ex. I at 4.) He avers that, after Jaramillo's grievance meeting, he was also removed as alternate shop steward. (Compl. ¶ 16(c); Doc. No. 51 Ex. I at 4.) This claim, however, does not support Plaintiff's theory that the Union treated him differently *vis-à-vis* its duty to pursue grievances against JMI.

> rejecting disparate-treatment grievances presented by blacks solely because the claims assert racial bias and would be very troublesome to process.

Id. While Plaintiffs concede that the Union has filed grievances on behalf of minority employees (Compl. ¶ 18), they argue that the Union declined to press grievances that would disadvantage a non-minority employee. (*Id.*)

When a plaintiff alleges that his union used the grievance process to discriminate against him, the traditional *McDonnell Douglas* burden-shifting framework applies. *See Durko v. OI-NEG TV Prods., Inc.*, 870 F. Supp. 1268, 1275 (M.D. Pa. 1994), *aff'd*, 103 F.3d 112 (3d Cir. 1996). Thus, a plaintiff has the initial burden of production and must show that: (1) the employer violated the CBA with respect to the plaintiff; (2) the union breached its duty of fair representation by not seeking to remedy the violation; and (3) the union was motivated by discriminatory animus. *Yon v. Southeastern Pa. Transp. Auth.*, Civ. A. Nos. 01-5231, 01-5232, 2003 U.S. Dist. LEXIS 20189, at *47 (E.D. Pa. Nov. 4, 2003), *aff'd*, No. 03-4605, 2004 U.S. App. LEXIS 21212, at *1 (3d Cir. Sept. 27, 2004). Once plaintiff establishes a prima facie case, the union must advance a legitimate, non-discriminatory reason for its conduct. The plaintiff then bears the burden of establishing pretext.

1. Boyer

Boyer claims that the Union engaged in race discrimination when it refused to grieve the Company's decision not to hire him for a December 2000 job bid.[11] The Company posted a position for a precious metal craftsman-specialist and specified that it wanted a fully qualified

[11]As discussed above, Boyer may only rely on this incident to support his § 1981 claim. Because the relevant statutes of limitations under Title VII and the PHRA preclude him from relying on this December 2000 job posting to support his Title VII and PHRA disparate treatment claims, we will grant summary judgment to the Union on these causes of action.

person for the position. Boyer applied for the position. However, he admits that he was not fully qualified. (Boyer Dep. at 163.) Because no fully qualified person applied for the position from within the Company, JMI hired Steve Morris from outside the Company in April 2001. (Compl. Ex. A-1.) The Union chose not to grieve the placement.

Boyer cannot prevail on his § 1981 disparate treatment claim against the Union because he cannot establish a prima facie case of race discrimination. He has not shown that the Union breached its duty of fair representation by not seeking to remedy his grievance. A union owes a duty of fair representation to its members, which

> requires a union "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." In other words, a union breaches the duty of fair representation when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith.

Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 44 (1998) (quoting *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)) (citing *Air Line Pilots v. O'Neill*, 499 U.S. 65, 67 (1991)). To demonstrate bad faith, the plaintiff must show that the union had hostility toward plaintiff or the plaintiff's class and that the hostility negatively affected the union's representation of the plaintiff. *Bell v. Glass, Molders, Pottery, Plastics and Allied Workers Int'l Union*, No. 00-1693, 2002 WL 32107218, at *4 (W.D. Pa. Aug. 29, 2002). In carrying out its duty of fair representation, "a union has 'broad discretion in its decision whether and how to pursue an employee's grievance against an employer.'" *Weber v. Potter*, 338 F. Supp. 2d 600, 606 (E.D. Pa. 2004).

Boyer seems to assert that the Union discriminated against him when it declined to pursue a grievance on his behalf after the Company hired an outside person for the precious metal position. However, a union does not automatically breach its duty of fair representation merely

because it declines to file a formal grievance with the employer, even if the employer breached the CBA. *See Maksin v. United Steelworkers of Am.*, 136 F. Supp. 2d 375, 381 (W.D. Pa. 2000) (citing *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)); *id.* at 382. Rather, a plaintiff must point to some evidence that the Union's decision not to pursue a grievance was "'arbitrary or based on discriminatory or bad faith motives.'" *Bell*, 2002 WL 32107218, at *3 (quoting *Greenslade v. Chicago Sun-Times, Inc.*, 112 F.3d 853, 867 (7th Cir. 1997)).

Boyer contends that when the Company hired Morris, the Union told him that it would not file a formal grievance because "there were larger issues pending." (Boyer Dep. at 257-58.) Boyer indicates that he had no idea what those larger issues were. (*Id.* at 259-60.) The Union's explanation for its decision not to file a grievance on behalf of Boyer, although vague, is not by itself evidence of either bad faith or discriminatory motive.

Boyer also points to an alleged statement by Metzler, the Union representative, to support his claim that the Union breached its duty of fair representation to him. When the Company hired Morris for the precious metal position, Boyer complained to Metzler. It was reported to Boyer that when he left the room after discussing the job bid with Metzler, Metzler made a comment "about Curtis Boyer, he don't give a fuck about Curtis - I ain't . . . I ain't helping him get that job." (*Id.* at 259.)[12] This evidence is not sufficient to establish a breach of the Union's duty to Boyer. "The finding of animosity on the part of a union representative alone does not constitute a breach of the duty of fair representation, but rather, Plaintiff must establish that the way in which the union handled his grievance was 'materially deficient.'" *Maksin*, 136 F. Supp.

[12]Boyer did not hear this comment (Boyer Dep. at 259), which may explain why Jaramillo's recollection of it is not exactly the same. (Jaramillo Dep. at 29-30.)

2d at 382 (quoting *Early v. Eastern Transfer*, 699 F.2d 552, 556 (1st Cir. 1983)). Boyer has offered no evidence to show that the Union's handling of his grievance was materially deficient.

Even if Boyer could establish a prima facie case, the Union provides a legitimate, non-discriminatory reason for choosing not to pursue his complaint. It chose not to press Boyer's grievance because the Union did not believe that JMI violated the CBA when it refused to award the job bid to Boyer. Under the terms of the governing CBA, an applicant for a trade or craft job "must have the necessary abilities and qualifications for the open job or jobs." (CBA § 7.2.12.1.) JMI reserves the right to create a position that requires a fully qualified tradesman or craftsman. (*Id.*) Boyer admitted that he was not fully qualified for the position. (Boyer Dep. at 163.) Under the circumstances, it was reasonable for the Union to conclude that it would not be successful in filing a grievance on Boyer's behalf. Boyer offers no evidence to show that this reason was pretextual. Therefore, his 42 U.S.C. § 1981 claim fails.

2. Jaramillo

The only evidence which could support Jaramillo's disparate treatment claim against the Union arises from a grievance which he filed after he was disciplined by the Company.[13] On July 24, 2001, Plaintiff received a written disciplinary notice which stated that he responded inappropriately to certain comments made to him by Alan Pinkerton, a co-worker. (Doc. No. 52 Ex. H; Jaramillo Dep. at 98-100.) The notice stated that Jaramillo had engaged in similar misconduct on one prior occasion. (Doc. No. 52 Ex. H; Jaramillo Dep. at 119.)

[13]Jaramillo does not allege that the Union refused to file a grievance on his behalf regarding an adverse employment action.

Jaramillo cannot show that this incident is an example of the Union's disparate treatment of him. He asserts that the Union did not keep him apprised of the status of the grievance. (Jaramillo Dep. at 122.) However, at some point, his discipline was reduced from a written warning to counseling. This was the same discipline that was given to Pinkerton. (Woodridge Dep. at 122, 125.) Plaintiff fails to offer any evidence to show that the Union breached its duty of fair representation or that it was motivated by discriminatory animus. Jaramillo's Title VII, PHRA, and 42 U.S.C. § 1981 disparate treatment claims against Local 1165-02 must be dismissed.

3. Wharton

As discussed above, because of the relevant statutes of limitations which apply to Wharton's claims, Wharton may only rely on her claim that the Union discriminated against her in handling her November 16, 2001, grievance regarding the proper notice required for a permanent shift reassignment under the CBA.[14] (Doc. No. 52 Ex. H.) In September, 2001, the Company asked Wharton whether she would like to be reassigned to first shift. (*Id.*) Wharton agreed to accept the job on September 20, 2001. (*Id.*) Asgar Alibhai, the Production Manager, told her to report to first shift on October 8, 2001. (*Id.*) After agreeing to begin working on first shift, Wharton requested written notice of the permanent transfer, which she believed was due under the CBA. JMI then offered to allow her to begin to work on first shift either on October 8, or wait until October 9 or October 15. She chose to report to first shift on October 8, 2001.

[14]Wharton does not allege that the Union refused to file a grievance on her behalf regarding an adverse employment action.

After she began to work on her new shift, Wharton filed a grievance with the Union. She believed that she was entitled to notice pay under the CBA since JMI did not provide her with written notice of the shift change. (*Id.*) The Company asserted that it provided Wharton with several options regarding when she could start to work a different shift. (*Id.*; Wharton Dep. at 94.) The Union took this grievance to the third step of the CBA's grievance process and ultimately agreed to withdraw it. (Hayman Dep. at 74; Doc. No. 52 Ex. H.) The Union was able to verify with the shop steward that the Company presented various options to Wharton and that she agreed to waive the written notice requirement by reporting to work for the new shift. (Hayman Dep. at 74; Doc. No. 52 Ex. H.)

Wharton is unable to establish a prima facie case of disparate treatment because she points to no evidence that the Union breached its duty of fair representation or that it withdrew its grievance because of her race. A union "may 'settle or even abandon a grievance, so long as it does not act arbitrarily.'" *Weber*, 338 F. Supp. 2d at 606 (quoting *Bazarte v. United Transp. Union*, 429 F.2d 868, 872 (3d Cir. 1970)). Plaintiff points to no evidence that the Union's decision to withdraw the grievance was arbitrary. Instead, Tom Metzler told Wharton that Norman Hayman, who is the Staff Representative for the United Steelworkers of America, "would not even touch" the matter because it was not strong enough. (Hayman Aff. ¶ 1; Wharton Dep. at 104.)[15] When Hayman made the determination to withdraw the grievance, he was not aware of Wharton's race. (*See* Hayman Aff. ¶ 11; Hayman Dep. at 109-10.)

[15]Hayman is responsible for investigating and arbitrating claims for the members of Local 1165-02. (Hayman Aff. ¶ 3.)

The Union has also established a legitimate, non-discriminatory reason for declining to pursue Wharton's grievance to arbitration. Hayman did not believe that Local 1165-02 could prevail in arbitration on Plaintiff's grievance because the CBA did not explicitly require written notice of a permanent shift change. (Hayman Dep. at 76.)[16] Furthermore, he believed that Wharton waived any written notice requirement which may have existed because she had more than five days' notice about the shift change. (*Id.* at 77.) Hayman explained that the Company gave Wharton a choice, in essence saying

> you can do A or you can do B. And she chose to do "A." And then when they did it, she turned around and said, oh, I didn't get written notice and now I want to be paid. I said, "That's not being forthright." I said, "We can't proceed with a grievance on that."

(*Id.* at 80.) Wharton offers no evidence to suggest that Hayman's explanation for the Union's decision to withdraw the grievance was a pretext for race discrimination. As such, her claims under Title VII, the PHRA, and 42 U.S.C. § 1981 must fail.

V. HOSTILE WORK ENVIRONMENT

A. Liability of Employer for Hostile Work Environment

An employer may be liable for discrimination under Title VII, the PHRA, and 42 U.S.C. § 1981 if an employee is subjected to a hostile work environment.[17] A hostile work environment exists when the "workplace is permeated with 'discriminatory intimidation, ridicule, and insult,'

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[16]Section 7.2.16 of the CBA, which is relied on by Wharton in her grievance, states in pertinent part: "Any change of hours will require five (5) workdays' notice." This provision makes no mention of a written notice requirement.

[17]The analysis of whether a hostile work environment exists is the same under Title VII, the PHRA, and § 1981. *Weston v. Pennsylvania Dep't of Corrections*, 251 F.3d 420, 426 n.3 (3d Cir. 2001); *Barbosa v. Tribune Co.*, Civ. A. No. 01-CV-1262, 2003 U.S. Dist. LEXIS 19483, at *11 (E.D. Pa. Sept. 23, 2003).

that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115, 116 (2002) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). Specifically, in order to prevail under a theory of hostile work environment based on racial harassment, a plaintiff must show that: (1) he suffered intentional discrimination because of his race; (2) the discrimination was regular and pervasive; (3) the discrimination detrimentally affected him; (4) the discrimination would have detrimentally affected a reasonable person in his position who is in the same protected class; and (5) there is a basis for employer liability. *Cardenas v. Massey*, 269 F.3d 251, 260 (3d Cir. 2001) (citing *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081 (3d Cir. 1996)).

In reviewing the validity of a plaintiff's hostile work environment claim, a court must evaluate all of the circumstances surrounding the asserted harassment. *Cardenas*, 269 F.3d at 261.

> Workplace conduct is not measured in isolation; instead, 'whether an environment is sufficiently hostile or abusive' must be judged 'by looking at all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 270-71 (2001) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998)). "[T]he advent of more sophisticated and subtle forms of discrimination requires that we analyze the aggregate effect of all evidence and reasonable inferences therefrom, including those concerning incidents of facially neutral mistreatment, in evaluating a hostile work environment." *Cardenas*, 269 F.3d at 261-62 (citing

Durham Life Ins. Co. v. Evans, 166 F.3d 139, 148-49 (3d Cir. 1999); *Aman*, 85 F.3d at 1081-84).[18]

In presenting their hostile work environment claims, Plaintiffs Boyer and Washington seek to rely on evidence that other African-Americans were discriminated against at JMI.[19] Plaintiffs Boyer, Washington, and Wharton also seek to rely on comments made about members of other protected classes to support their own hostile work environment claims. In reviewing the totality of the circumstances, evidence of discrimination against other individuals may give rise to an inference of discrimination and allow a court to conclude that actionable harassment existed as to the plaintiff. *Velez v. QVC, Inc.*, 227 F. Supp. 2d 384, 412 (E.D. Pa. 2002). Thus, a plaintiff may be able to rely on evidence that other employees both within and outside of his protected class were harassed to support his own claim of discrimination. *See, e.g., Schwapp v. Town of Avon*, 118 F.3d 106, 111-12 (2d Cir. 1997); *West v. Phila. Elec. Co.*, 45 F.3d 744, 757

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[18]The requirement that we review a plaintiff's whole work environment is tempered by the recognition that not all places of employment are alike. In reviewing the circumstances of asserted harassment, we are instructed to "pay careful consideration of the social context in which particular behavior occurs and is experienced by its target." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). "Speech that might be offensive or unacceptable in a prep school faculty meeting, or on the floor of Congress, is tolerated in other work environments." *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1538 (10th Cir. 1995). While one employee may not enjoy being subject to "intimidation, ridicule, and insult," there is less likely to be a violation of Title VII when such derisive behavior is directed indiscriminately at all employees. *Bolden v. PRC, Inc.*, 43 F.3d 545, 551 (10th Cir. 1994). Moreover, the environment may differ from department to department in a given place of employment.

[19]Defendant JMI has filed a Motion In Limine To Exclude Certain Evidence of Alleged Harassment (Doc. No. 69). It seeks to exclude evidence of alleged harassment of which each Plaintiff was unaware as well as evidence of alleged harassment for which there is no nexus to each of Plaintiff's claims. (*Id.*) In the course of reviewing the merits of each Plaintiff's hostile work environment claims in this Memorandum, we will address the merits of Defendant's Motion in limine.

(3d Cir. 1995)*; Velez*, 227 F. Supp. 2d at 413-14. Here, Plaintiffs may rely on alleged improper harassment of employees generally, even though some of the behavior targeted members of other protected classes.

In order to rely on evidence that other individuals were harassed, however, a plaintiff must have been aware of the alleged harassment. *See Diaz v. Rent-A-Center, Inc.*, Civ. A. No. 03-3763, 2004 U.S. Dist. LEXIS 18170, at *6 (E.D. Pa. Sept. 8, 2004); *McKenna v. City of Philadelphia*, Civ. A. No. 98-5835, 2003 U.S. Dist. LEXIS 1095, at *25 (E.D. Pa. Jan. 17, 2003); *Velez*, 227 F. Supp. 2d at 412. In many instances, the Plaintiffs fail to recognize or adhere to this knowledge requirement. Each Plaintiff seeks to rely on the experiences of the other Plaintiffs, regardless of whether they can show the requisite knowledge. Despite Plaintiffs' attempts to rely on their collective testimony to paint a picture of a work environment poisoned by racial animosity as to each Plaintiff, we will limit our analysis regarding individual claims to those incidents of alleged harassment about which each Plaintiff was aware.[20]

In *Velez*, the Court detailed several factors that should be considered in analyzing whether evidence of the treatment of other individuals may create an inference of discrimination. *Velez*, 227 F. Supp. 2d at 413. A court should consider whether the harassment against members of other protected classes: (1) was committed by the same person who allegedly harassed the plaintiff; (2) occurred in close temporal proximity to the harassment targeted at the plaintiff; and

[20]We note that evidence about the harassment of other individuals may be relevant to a determination of the Company's liability, regardless of whether the specific Plaintiff knew about the harassment. Such evidence may establish that the Company had actual or constructive notice of the hostile work environment and failed to adequately respond. *See Davis v. United States Postal Serv.*, 142 F.3d 1334, 1342 (10th Cir. 1998) (concluding that the jury could have found that defendant employer negligently handled harassment complaint because it was aware of previous complaints against the same employee).

(3) is similar in nature and kind to the harassment experienced by the plaintiff. *Id.* Thus, the key inquiry is whether a jury could conclude that "the discrimination of which the plaintiff complains is sufficiently similar in time, nature, and kind to that suffered by other employees . . . ." *Id.*

In order to determine the merits of the Plaintiffs' hostile work environment claims, we will, of necessity, review the details of the claims of each Plaintiff.

1. Boyer

Boyer alleges that, between 1995 and 1997, Steve Eachus, his supervisor at the time, denied his request for a scheduling accommodation while granting a similar request to a Caucasian employee. (Compl. Ex. A-1.) Plaintiff also asserts that Eachus required him to take a test to maintain his qualifications, which he passed, and that Eachus treated him in a demeaning manner. (Doc. No. 36 Ex. H at 3-4; Boyer Dep. at 63-64.)

Hostile work environment claims are "based on the cumulative affect of individual acts" and "cannot be said to occur on any particular day." *Morgan*, 536 U.S. at 115.[21] The unlawful employment practice at issue in a hostile environment claim "occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Id.* (citing *Harris*, 510 U.S. at 21). In *Morgan*, the Supreme Court held that untimely acts contributing to a hostile work environment claim may be actionable so long as the hostile work environment claim is timely. *Id.* at 117. Hostile work environment claims are timely if "an act contributing to the claim" falls within the applicable limitations period. *Id.* So long as one of the discriminatory acts contributing to the claim is timely, "the entire time period

[21]The Court's approach to the continuing violation doctrine applies to claims brought under Title VII, the PHRA, and 42 U.S.C. § 1981. *Boyer v. Johnson Matthey, Inc.*, No. 02-CV-3512, mem. op. at 3 n.3 (E.D. Pa. Mar. 31, 2004).

of the hostile environment may be considered by a court for the purposes of determining liability." *Id.* Otherwise time-barred discriminatory acts will be considered timely only if those acts and the timely act are part of the same hostile work environment claim. *Id.* at 120.

In our March, 2004, Memorandum & Order, we concluded that it was not clear that JMI's denial of Boyer's request for leave was separate from his timely harassment claim. *Boyer v. Johnson Matthey, Inc.*, No. 02-CV-3512, mem. op. at 8-9 (E.D. Pa. Mar. 31, 2004). Because we reviewed this evidence through the lens of a partial motion to dismiss, we determined that we would provide Boyer with the opportunity to develop his harassment claim. Based on the record currently before us, it is clear that the acts which allegedly occurred in 1995, 1996, and 1997 are not related to the more recent conduct that forms the basis of his timely harassment claim. Moreover, Boyer does not contend that Eachus was involved in any of the more recent harassment. Under the circumstances, the relevance of the remote conduct of Eachus is tenuous at best.

Boyer points to other evidence which he asserts contributed to his timely hostile work environment. Rich Goodyear made fun of his name at some point in 2001. (Boyer Dep. at 238; Doc. No. 36 Ex. H at 11.) "[I]t started like Curt Boy-er, you know, that's how it started, and then it went to, you know, Curt Boy." (Boyer Dep. at 238.) However, Goodyear did not repeat this phrase after Boyer complained to him about it. (Boyer Dep. at 238-39; Doc. No. 36 Ex. H at 11.) It appears from Boyer's testimony that he was offended when Goodyear used his name as a vehicle by which to refer to him as "boy." However, the record also indicates that Caucasian employees called other Caucasian employees "boy." (Doc. No. 36 Ex. H at 11.)

John Bennett, a supervisor, called Boyer a "bigot." (Boyer Dep. at 171.) Bennett then told various other people throughout the day, including Asgar Alibhai, another supervisor, that Boyer was a "bigot." (*Id.* at 172-73.)[22] Boyer confronted Bennett about his remarks. (*Id.* at 173.) After a meeting with Renee Woodridge, the Company's Human Resources Generalist (Brady Aff. ¶ 3), and Bernie Brady,[23] Bennett apologized to Plaintiff for using the term "bigot." (Boyer Dep. at 176.)

Two supervisors also used abusive language toward Boyer. Bill Hammond told Boyer that he did not know his "mother fucking job." (*Id.* at 196.) Brady talked to Hammond about the comment and Hammond then apologized to Boyer for making the comment. (*Id.* at 197.) In addition, Alibhai called Boyer "all kinds of MF-ers." (*Id.* at 198.) He, too, apologized to Boyer after Plaintiff reported this to Brady. (*Id.* at 199.)

Boyer relies on statements that were not made directly to him. According to Plaintiff, Bob Gable told Wells that "he's going to work like a nigger." (*Id.* at 179.) Wells relayed this remark to Boyer, and Boyer told Wells that he needed to address it. (*Id.*) In addition, Boyer heard the phrase "too many Indians, not enough chiefs" used (*id.* at 180), and also heard the terms "camel jockey," "dot heads," and "towel heads" being used every day. (*Id.* at 184-85.)

This evidence, viewed as a whole, does not establish the existence of an actionable hostile work environment. The asserted harassment was not regular and it was not pervasive. Certainly the remarks of which Boyer complains were offensive, but that is all they were. There is no

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[22]Joe Wilson and Citirah Wharton also told Boyer that Bennett referred to them as bigots. (Boyer Dep. at 177-78.)

[23]Brady is the Manager, Human Resources for Noble Metals, North America in JMI's Precious Metals Division. (Brady Aff. ¶ 1.)

indication that they were accompanied by physical threats and there is no indication that they interfered with Boyer's job performance.

Boyer testified that two individuals made separate racial comments directly to him. However, when he told Goodyear that he did not like being called "boy" and when he told Bennett that the use of the term "bigot" was improper, both individuals stopped using the offending terms. (Boyer Dep. at 176, 238-39; Doc. No. 36 Ex. H at 11.) Similarly, when he complained about Hammond and Alibhai's use of inappropriate language, they apologized. (Boyer Dep. at 197, 199.) The use of the term "nigger," which was not made with respect to Boyer and which was not used in his presence, although offensive, does not constitute regular and pervasive harassment of Boyer. *See Al-Salem v. Bucks County Water & Sewer Auth.*, Civ. A. No. 97-6843, 1999 U.S. Dist. LEXIS 3609, at *15-16 (E.D. Pa. Mar. 26, 1999)

In addition, the comments which were directed at members of other protected classes were not similar to the offending remarks directed at Boyer. Moreover, these remarks about other people were made primarily by co-workers Alan Pinkerton and Rich McCombs. (*Id.* at 183-84.) Boyer does not allege that these two employees made any racist remarks about him. Further, Boyer did not report these comments to JMI as they were made. (*Id.* at 188-90.) Apparently, the remarks about others did not bother him as much as the remarks about which he immediately complained. Because the alleged harassment of Boyer was not regular and pervasive, Boyer may not prevail on his hostile work environment claim.

2. Wells

Wells avers that he has been subjected to a hostile work environment since he began to work at JMI in 1988. However, Wells also testified that there were two different time periods

when most of the harassment occurred. In 1989, Plaintiff began to maintain a journal in which he chronicled incidents that he perceived as discriminatory. (Wells Dep. at 114-15.) He continued to log incidents into 1991. (*Id.*) Thereafter, Wells made no entries in his notebook until 2000, when the alleged harassment began again. Wells has failed to explain the connection between these events which occurred almost ten years apart. *See Morgan*, 536 U.S. at 118. Because of the significant hiatus, we will not consider events that occurred prior to 1991 as part of a continuing violation. They cannot reasonably be construed to be part of the harassment which Wells asserts began to occur in 2000.

Wells contends that he has been the victim of more recent harassment by supervisors and co-workers.[24] He testified that Alibhai chastised him for working too slowly, and that Alibhai, Woodridge, and Wells met to discuss Wells's poor performance in December 2001. (Wells Dep. at 96, 99, 175.) Wells claims that Alibhai "used to be hard on the blacks. That's all there is to it." (*Id.* at 106.) However, he could not provide specific examples to support his claim that Alibhai discriminated against African-Americans. "Speculation and subjective opinions are not competent evidence." *Hay v. GMAC Mortgage Corp.*, Civ. A. No. 2001-CV-1030, 2003 U.S.

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[24]Plaintiff argues that he was harassed when his supervisor, Asgar Alibhai, gave him more difficult work than Caucasian employees. (Compl. Ex. A-4; Wells Dep. at 85.) However, an assignment to an undesirable job constitutes an adverse employment action but does not necessarily support a hostile work environment claim. *See Boyer v. Johnson Matthey, Inc.*, No. 02-CV-3512, mem. op. at 12 (E.D. Pa. Mar. 31, 2004). Plaintiff does not assert that Alibhai's purported harassment of him culminated in the reassignments. In fact, there is no evidence that Alibhai made assignments based on race. Wells testified that Alibhai reassigned him to more difficult jobs because he worked too slowly (Wells Dep. at 83, 85), and that Mike Duffy, a Caucasian employee, also performed these difficult jobs. (*Id.* at 90-91, 93-94.) Alibhai assigned jobs based on employee efficiency. For example, he treated one employee better "because I guess he spooled a lot faster than anybody else, so he was allowed to do certain things that other people weren't." (*Id.* at 89.) Plaintiff points to no evidence to support his claim that Alibhai's conduct was motivated by discrimination.

Dist. LEXIS 16552, at *25 (E.D. Pa. Sept. 15, 2003) (granting summary judgment on hostile work environment claim). Ultimately, a plaintiff must demonstrate that race was "a substantial factor in the harassment" and that he would have been treated differently had he been Caucasian. *Aman*, 85 F.3d at 1083.

Wells also points to several comments which he claims support his harassment claim against the Company. Bob Gable, a supervisor, told Wells and another employee that Gable "nigger-rigged" a machine. (Wells Dep. at 139.) When Wells told him that he disliked that term, Gable "acted a bit sheepish." (Compl. Ex. A-4.) Two employees also called Wells "boy." Bob Hutchinson, a co-worker, used this term twice to refer to Wells. (Wells Dep. at 121.) Matt Morrell, another co-worker, called Wells "boy" three times. (*Id.* at 133.) Morrell apologized to Wells for making the first two comments. (*Id.* at 130.)

At most, Wells can point to six racial comments which were made, one of which was not made about him, between 2000 and May 2002, when he filed his charge of discrimination with the PHRC. We are satisfied that this evidence is not sufficient to establish that Wells was subjected to regular and pervasive harassment based upon race. *See Jackson v. Flint Ink N. Am. Corp.*, 370 F.3d 791, 795 (8th Cir. 2004) (affirming grant of summary judgment on hostile environment claim when plaintiff was only exposed to six racially derogatory comments, including use of the term "nigger-rigging," over eighteen months); *see also Harris v. SmithKline Beecham*, 27 F. Supp. 2d 569, 578 (E.D. Pa. 1998) ("A plaintiff cannot rely upon casual, isolated, or sporadic incidents to support her claim of hostile work environment harassment." (citing *Andrews*, 895 F.2d at 1482)). While derogatory racial remarks are improper,

> racial comments that are sporadic or part of casual conversation do not violate Title VII. For racist comments, slurs and jokes to constitute a hostile work environment,

> there must be more than a few isolated incidents of racial enmity, meaning that instead of sporadic racist slurs, there must be a steady barrage of opprobrious racial comments.

Al-Salem, 1999 U.S. Dist. LEXIS 3609, at *15-16 (internal citations omitted). In the instant case, there is no steady barrage. Plaintiff has failed to show that the harassment was regular and pervasive. Thus, Wells's hostile work environment claim against the Company fails.[25]

3. Wharton

Wharton points to instances of verbal harassment which occurred during two separate time periods: (1) prior to 1999; and (2) beginning in 2001. As to the earlier time period, Wharton worked with Alan Pinkerton and heard him use various slurs. Pinkerton called Steve Eachus, a supervisor, a "nappy headed Jew bastard." (Wharton Dep. at 39.) Pinkerton also frequently called his department manager "dot head" and "camel jockey." (*Id.* at 36, 38.) Wharton also heard a verbal altercation between two co-workers in which they used the terms "big fat whop" [sic] and "Polish asshole" to refer to each other. (*Id.* at 51-52.) Plaintiff was subjected to these remarks prior to May 1999. (*Id.* at 37.)

These statements do not raise an inference of discrimination as to Wharton's more recent claims of harassment. *See Velez*, 227 F. Supp. 2d at 412. None of her more recent allegations of harassment involve Pinkerton. Moreover, these remarks were made at least nineteen months before the next series of hostile comments. There is no temporal proximity between the comments that were made about other individuals and the comments which were made about her.

[25]We would reach the same conclusion even if we considered the alleged discriminatory acts which occurred as early as 1988. (Doc. No. 51 Ex. J at 5.)

In considering more recent comments on which Wharton relies to support her harassment claim, it is again apparent that Wharton has not established that she was subjected to a hostile work environment. Initially we note that Wharton has never heard a supervisor make a racial slur. (Wharton Dep. at 34.) Beginning in 2001, Wharton heard Rich McCombs, a co-worker, use the terms "wetback," "dot heads," and "chinks." (*Id.* at 52-53.) However, Plaintiff does not point to any timely incidents of discriminatory conduct that were directed at her to support her harassment claim. Title VII prohibits an employer from discriminating against an individual "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2000). This language applies to discrimination which takes the form of harassment, *Harris*, 510 U.S. at 21, and focuses on the harassment of the individual plaintiff. We conclude that the evidence on which Wharton relies is not sufficient to satisfy her burden of showing that she suffered discrimination as a result of her race or that the alleged discrimination was regular and pervasive.

4. Washington

Washington's story is more compelling. Washington began to work for JMI on March 17, 1997. (Washington Dep. at 34.) During the next seven years, he worked in the tube department[26] (*id.* at 34-35) and asserts that he was subjected to various forms of harassment.[27]

[26]It is interesting that Washington is the only Plaintiff who worked primarily in the tube department. Boyer worked in the tube department for only two weeks during 1997. (Boyer Dep. at 82-83.) Wharton and Wells never worked in the tube department. Washington relies on various incidents of harassment about which the other Plaintiffs in this case were unaware, presumably because much of the asserted harassment of Washington occurred within the tube department, where the other Plaintiffs did not work.

[27]In responding to Defendant JMI's Interrogatories, Washington alleged that harassment occurred as recently as September 2004.

a. Alleged Harassment By Supervisors

According to Washington, his supervisors contributed to a hostile work environment. In 1997, Roger O'Kane told Washington that he had a surveillance tape which showed Washington, Wharton, Boyer, Joe Wilson, and Joe Fultz watching television when they were not on break. O'Kane declined to share the tape with Washington and told him that, "well, I'm going to be watching you anyway." (Doc. No. 51 Ex. I at 6.) Plaintiff believes that O'Kane confronted him because a Caucasian employee blamed them for not being able to complete his work. (*Id.*)

Joe McGrath, another JMI supervisor, admonished Washington for talking to Wharton, who worked in a different department. (*Id.* at 5; Washington Dep. at 107, 110.) McGrath told Washington not to talk to Wharton between five and nine times. (Washington Dep. at 113.) Plaintiff believes that McGrath tolerated similar conduct when done by Caucasian employees. (Doc. No. 51 Ex. I at 5; Washington Dep. at 113-15.)

In approximately 2000, Woodridge was going to discipline Washington for allegedly sleeping on the job. (Doc. No. 51 Ex. I at 5.) When Washington told Woodridge that he had a witness who would say that he was awake, Woodridge did not impose discipline but told Washington not to sleep on the job in the future. (*Id.* at 6.) McGrath also confronted Washington several times about sleeping while at work, presumably because Washington would often sit with "his feet up in the air." (Washington Dep. at 183.) McGrath ultimately did discipline Plaintiff for sleeping on the job. (*Id.* at 186.)

In 2001, Washington hung a calendar on the wall with a revealing picture of a Caucasian female. (Doc. No. 51 Ex. I at 5.) He claims that a Caucasian employee then posted a revealing picture of an African-American female. After this picture was put up, a manager told

Washington to take down both pictures. After Washington removed the calendar and the picture, someone put the same calendar back on the wall. (*Id.*)

Washington also testified that he heard about a statement made by Ron Gabriel, a supervisor, that "they niggered it" and another statement made by Alibhai about working "like a nigger." (Washington Dep. at 91-92.) Somebody also told Plaintiff that JMI security guards stated that there would never be an African-American in that office. (*Id.* at 224.)

b. Alleged Harassment by Co-Workers

Plaintiff avers that various co-workers have engaged in harassing conduct directed at him since he began to work for the Company. During his probationary period in 1997, co-worker Kevin Supplee refused to train him because he "had a problem with black people." (Washington Dep. at 99, 292, 300.) Sometime in 1997, Washington played "African" music, such as blues and jazz, on a radio at work. (Doc. No. 51 Ex. I at 3-4; Washington Dep. at 134.) Various supervisors and co-workers asked Washington to turn his radio down. (Washington Dep. at 119-20, 132.) Dave Souder, a co-worker, threatened to break his radio and "to take a baseball bat to him [Washington]." (Doc. No. 51 Ex. I at 4; Washington Dep. at 122-23.) Somebody then cut the cord on his radio. (Washington Dep. at 134.)

Washington also asserts that he was subjected to verbal harassment. In 1997, he heard a conversation among a group of co-workers, including Supplee, in the tube department about "burning them all out" in Coatesville. (Washington Dep. at 54-55, 298.) Washington was unsure about whether these co-workers were talking about African-Americans. (*Id.* at 55.) When Washington told Supplee that he was offended by the conversation if they were referring to African-Americans, Supplee "backed off." (*Id.*) While Washington heard the contents of this

conversation, it was not directed at him. Also in 1997, Washington became offended when several employees sang the song "Whitey on the Moon" because he thought they were making fun of his race. (*Id.* at 316, 320-21.)

On another occasion, an Italian co-worker wanted to tell Washington a racial joke. (*Id.* at 64.) Instead of telling the joke about an African-American, the employee wanted to make the character of the joke Italian. After the individual began to tell the joke, Washington said that he did not want to hear the rest of it. (*Id.* at 67.)

Kevin Dougherty, another co-worker, called Washington "old boy" on one occasion. (*Id.* at 57-58.) However, Dougherty also used that term to refer to other, white employees. (*Id.* at 56.) When Plaintiff complained to him, Dougherty stopped calling him "old boy." (*Id.* at 58.)

In response to news involving Al Sharpton shutting down the New Jersey Turnpike into Atlantic City, another co-worker said that "black people are always crying. They never - they are always begging for stuff. We gave them freedom and they are always begging for stuff, begging for something. They are all always crying." (*Id.* at 63.) Earl Miller, another co-worker, said that Washington "should stop reading books by black authors and start reading them by white [authors]" to learn the truth about world history. (*Id.* at 61.) Miller also expressed his support for North Carolina's right to display the confederate flag and said that "we, being the black people, are always trying to cause trouble." (*Id.* at 62.)

In 2000 or 2001, Ed Lewandowski, another co-worker, said that "black people have smaller brains and white people have bigger brains." (*Id.* at 59-60.) Two employees also told Washington that they heard Washington supported the Taliban. (*Id.* at 151.) After the September 11, 2001, attacks on the United States, Souder told Washington that "everybody that

looks like a Muslim should be burned on a cross." (Doc. No. 51 Ex. I at 11-12.) On August 20, 2004, Souder asked whether "spear chucking" came from Africa. (Doc. No. 51 Ex. J at 5; Washington Dep. at 337.) On September 17, 2004, Eric Klag told Washington that he had "niggered the tooling." (Doc. No. 51 Ex. J at 5.)

Washington testified that it is also "a running joke" to refer to Alibhai as a "camel jockey." (Washington Dep. at 88.) Lewandowski constantly referred to Chinese people as "chinks" and made derogatory comments about Jewish people. (*Id.* at 64-66.)

Plaintiff also testifies that he heard about racially insensitive conduct and statements which were not made in his presence. Washington heard about Pinkerton calling Jaramillo a wetback and spic. (*Id.* at 49-50). He also heard about a co-worker telling Jaramillo outside of work "that you are hanging with those niggers and they are going to bring you down." (*Id.* at 86-87.) Plaintiff also heard about a noose being hung at the Company. (*Id.* at 221-22.)

c. Summary Judgment as to Washington's Harassment Claim

We are satisfied that there is sufficient evidence from which a jury could conclude that Washington was subjected to a racially hostile work environment. The record contains numerous examples of regular and pervasive racial harassment directed at Washington or of which he was aware that would be offensive to any reasonable person. According to Washington, during the course of his employment with JMI, both supervisors and co-workers engaged in various forms of harassment. While some of the incidents on which Washington relies do not, on their face, reflect racial animus, we must consider the entire environment in which Washington worked. *See Cardenas*, 269 F.3d at 261. Based on Washington's testimony, it is apparent that his work environment was polluted with racial animus. When he began to work at the Company, he

encountered difficulty in receiving training from a co-worker who mistrusted African-Americans. As he continued to work at JMI, he was counseled about engaging in behavior which seemed to be tolerated when done by Caucasian employees. He also heard about, and was himself subjected to, offensive racial comments.

There is also sufficient evidence, if believed, to conclude that JMI should be liable for the racially hostile work environment. Courts distinguish between supervisor and co-worker conduct in assessing whether an employer may be held liable for workplace harassment. When a plaintiff alleges that a supervisor contributed to a hostile work environment, he may only prevail if the employer is vicariously liable. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). When no tangible employment action is taken, an employer may assert an affirmative defense.[28] To prevail on this affirmative defense, JMI must show: (1) that it exercised reasonable care to prevent and correct harassment; and (2) that the plaintiff unreasonably failed to take advantage of the preventive opportunities or to avoid harm otherwise. *Id.*; *see also Pennsylvania State Police v. Suders*, 124 S. Ct. 2342, 2349, 2352 (2004)*; Faragher*, 524 U.S. at 807; *Cardenas*, 269 F.3d at 267. When conduct of a co-worker is at issue, an employer will face respondeat superior liability only if it was negligent in failing to correct the harassment. The employer will be liable when it "'knew or should have known of the harassment and failed to take prompt remedial action.'" *Kunin v. Sears Roebuck & Co.*, 175 F.3d 289, 293-94 (3d Cir. 1999) (quoting *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990)).

[28]Here, Washington does not allege that he suffered a tangible employment action. (Doc. No. 58 at 18-19.)

We conclude that Washington has proffered sufficient evidence to show that JMI could be liable for both supervisor and co-worker behavior. The law does not require Washington to file a formal complaint in order for him to show that the Company failed to take adequate measures to remedy the asserted harassment. *Cardenas*, 269 F.3d at 259. Thus, Washington's failure to complain about every incident of harassment is not fatal to his claim. Moreover, a jury could conclude that the Company did not take reasonable care to correct and prevent the harassment from occurring. Washington alleges that racially-charged conduct and comments have been common throughout the course of his employment with JMI, reflecting a distinct bias against members of protected minority groups. Because he has pointed to sufficient evidence to show the existence of a hostile work environment, JMI's Motion for Summary Judgment as to his claim will be denied.

B. Liability of Union for Hostile Work Environment

A labor organization, such as a union, may be liable under Title VII, the PHRA, and § 1981 for creating a hostile work environment. *See Durko v. OI-NEG TV Prods., Inc.*, 870 F. Supp. 1268, 1277 (M.D. Pa. 1994), *aff'd*, 103 F.3d 112 (3d Cir. 1996). To determine whether a plaintiff may recover against a union under a hostile work environment theory, he must show that: (1) he was subjected to a hostile work environment; (2) he requested action on the part of the union; and (3) the union ignored his request for action. *Id.* Local 1165-02 failed to address the argument that it did not adequately address Plaintiffs' hostile work environment complaints. However, because we have concluded that Plaintiffs Boyer, Wharton, and Wells were not subjected to a hostile work environment, they may not prevail on their hostile work environment

claims against the Union.[29] Since the Union did not advance an argument regarding Washington's hostile work environment claim, that claim may go forward.

An appropriate Order follows.

[29]It is significant that Plaintiffs Boyer, Wharton, and Wells concede that they failed to avail themselves of the Union's Civil Rights Committee, which existed to address concerns about discrimination. (Doc. No. 59 at 21.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CURTIS BOYER, DAVID J. JARAMILLO, DARIEN WASHINGTON, SAMUEL LEE WELLS, and CITIRAH WHARTON	:	CIVIL ACTION
	:	NO. 02-CV-8382
v.	:	
JOHNSON MATTHEY, INC. and UNITED STEELWORKERS OF AMERICA, LOCAL 1165-02	:	

ORDER

AND NOW, this 6th day of January, 2005, upon consideration of the Motions for Summary Judgment filed by Defendants Johnson Matthey, Inc. ("JMI") and United Steelworkers of America, Local 1165-02 ("Union"), and all papers submitted in support thereof and in opposition thereto, it is ORDERED that:

(1) JMI's Motion for Summary Judgment as to the Claims of Plaintiff Citirah Wharton (Doc. No. 29, 02-CV-8382) is GRANTED;

(2) JMI's Motion for Summary Judgment as to the Claims of Plaintiff Curtis Boyer (Doc. No. 35, 02-CV-8382) is GRANTED;

(3) JMI's Motion for Summary Judgment as to the Claims of Plaintiff Samuel Lee Wells (Doc. No. 42, 02-CV-8382) is GRANTED;

(4) JMI's Motion for Summary Judgment as to the Claims of Plaintiff Darien Washington (Doc. No. 45, 02-CV-8382) is DENIED;

(5) Union's Motion for Summary Judgment as to the Claims of Curtis Boyer (Doc. No. 46, 02-CV-8382) is GRANTED;

(6) Union's Motion for Summary Judgment as to the Claims of David J. Jaramillo (Doc. No. 47, 02-CV-8382) is GRANTED;

(7) Union's Motion for Summary Judgment as to the disparate treatment claim of Darien Washington (Doc. No. 48, 02-CV-8382) is GRANTED;

(8) Union's Motion for Summary Judgment as to the Claims of Samuel Lee Wells (Doc. No. 49, 02-CV-8382) is GRANTED;

(9) Union's Motion for Summary Judgment as to the Claims of Citirah Wharton (Doc. No. 50, 02-CV-8382) is GRANTED; and

(10) JMI's Motion In Limine To Exclude Certain Evidence of Alleged Harassment (Doc. No. 69, 02-CV-8382) is GRANTED in part and DENIED in part. *See* attached Memorandum.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge